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In The

Supreme Court of the United States

October Term, 1990

JAMES P. LEHNERT, et al.,

Petitioners,

v.

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeal for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND H. PAUL LILLEBO IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF AMICI

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) and H. Paul Lillebo, one of 92 plaintiffs in the lawsuit of *Lillebo v. Davis*, pending before the California Court of Appeal, No. 3 Civ. C006009, respectfully submit this brief amicus curiae in support of petitioners, James P. Lehnert, *et al.*

Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Amicus PLF is submitting this brief because it believes its public policy perspective and litigation experience in the agency shop arena will provide an additional viewpoint with respect to the issues presented. PLF has participated in numerous cases before this Court including amicus curiae participation in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). Recently, PLF attorneys represented the petitioners in *Keller v. State Bar of California*, ___ U.S. ___, 58 U.S.L.W. 4661 (1990) (limiting the integrated bar's ability to spend objecting member's dues for political activities). Additionally PLF attorneys represented the petitioner in *Cumero v. Public Employment Relations Board*, 49 Cal. 3d 575 (1989) (limiting the use of an objecting nonmember's fee to those activities statutorily authorized in California's Educational Employment Relations Act). PLF believes the lower court's opinion incorrectly analyzed the holdings of this Court resulting in objecting nonmembers being compelled to finance the political and ideological activities of a private

labor organization with which they disagree. This compelled financing abridges their First Amendment rights of speech and association.

H. Paul Lillebo is one of 92 plaintiffs in *Lillebo v. Davis*, No. 3 Civ. C006009, an agency shop lawsuit presently pending before the California Court of Appeal for the Third Appellate District. The plaintiffs in *Lillebo* are present and former employees of the State of California who are challenging California law which authorizes an agency shop fee to be used for lobbying purposes unrelated to the duties of an exclusive representative. These plaintiffs believe that use of dissenting employees' agency shop fees to underwrite the costs of lobbying activities and other policy related activities violates their fundamental constitutional rights of freedom of speech and association. These activities do not further the promotion of labor peace and stability.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 881 F.2d 1388 (6th Cir. 1989).

STATEMENT OF THE CASE

Under Michigan's Public Employment Relations Act, Ferris State College (Ferris), a four-year public institution of higher learning in Michigan, entered into a collective bargaining agreement with Ferris Faculty Association

(FFA). FFA is affiliated with the Michigan and National Education Associations (MEA and NEA, respectively). FFA has been recognized as the exclusive bargaining representative for the faculty of Ferris. Ferris and FFA negotiated an agency shop provision in which Ferris automatically deducted from the pay of nonmembers a "service fee" equal to the dues of members of the FFA. Of the $284 service fee required in 1981-82, $24.80 was paid to FFA, $211.20 went to the MEA, and $48 was collected by the NEA. *Lehnert v. Ferris Faculty Association*, 881 F.2d 1388, 1389 (6th Cir. 1989).

Six faculty members objected to the use of their service fees for any purposes other than FFA's duties as exclusive representative of the Ferris unit. To use the compelled fees for other purposes, they argued, infringed on their First Amendment rights of freedom of speech and association.

The Sixth Circuit Court of Appeals held that objecting nonmembers could constitutionally be charged for (1) expenditures for lobbying and similar "political" activities; (2) expenditures for services provided to other bargaining units; (3) costs of preparing for strikes; (4) conventions; and (5) public relations expenditures designed to enhance the reputation of the teaching profession. *Lehnert*, 881 F.2d at 1391.

SUMMARY OF ARGUMENT

The starting point in deciding the constitutionality of expenditures of agency shop must be the identification of

the government's compelling state interest. Merely claiming that an important state interest is at stake is not enough. That interest must actually be advanced by the law in question. This Court held, "[t]hus, insofar as the service charge is used to finance expenditures by the Union for the purposes of *collective bargaining, contract administration, and grievance adjustment*," the agency shop law was constitutional. *Abood v. Detroit Board of Education*, 431 U.S. 209, 225-26 (1977) (emphasis added). This Court went on to hold, however, the important governmental interest of labor peace and stability was not advanced by compelling employees financially to support causes not germane to collective bargaining, contract administration, and grievance adjustment. *Id.* at 235. Quoting from Thomas Jefferson, this Court stated: " ' "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." ' " *Id.* at 235 n.31.

This view represents the safeguards in the First Amendment. It leaves the government no power whatever to compel one person to expend earnings to advance lobbying and other policy related activities he or she would like to see defeated or to urge ideologies and causes he or she believes would be hurtful. The law can constitutionally authorize a compelled fee only when the recognized employee organization bargains directly with the employer on labor-management issues to foster labor peace and stability. *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435, 447 (1984); *see Abood*, 431 U.S. at 222-23; *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302-03 (1986). The decision of the Sixth Circuit Court of Appeals goes beyond these limits. It

allows the compelled fee to underwrite the costs of lobbying and policy related activities *not* related to collective bargaining. Furthermore, this decision permits the compelled fee to be used to finance the preparation of illegal activities. The decision of the Sixth Circuit fails to establish a compelling state interest justifying an impingement on nonmembers' First Amendment rights of speech and association and should be reversed.

ARGUMENT

I

THE FIRST AMENDMENT PROHIBITS THE USE OF AN OBJECTING FEE PAYER'S SERVICE FEE FOR ACTIVITIES NOT SUPPORTED BY A "COMPELLING" OR "IMPORTANT" GOVERNMENTAL INTEREST

The constitutionality of compelled membership and financing of an organization as a condition of continued employment has been the subject of litigation for more than a third of a century. This Court first confronted the issue in *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956). That case concerned the constitutionality of a union shop agreement as authorized by Section 2, Eleventh, of the Railway Labor Act (45 U.S.C. § 152, Eleventh). *Id.* at 228. Such union shop agreements require all employees in the bargaining unit to become a member of and to pay service fees to the labor organization selected as exclusive representative. *Id.* at 228-29. This Court held that the enactment of Section 2, Eleventh, was well within Congress' authority under the Commerce Clause and that union shop did not violate employees' First Amendment rights. *Id.* at 235, 238. This Court noted, however, that if

the compelled fees collected from dissenting employees "are in fact imposed for purposes not germane to collective bargaining a different problem would be presented." *Id.* at 235 (footnote omitted).

That problem was indeed presented five years later in *International Association of Machinists v. Street*, 367 U.S. 740 (1961). This Court ruled that the Railway Labor Act prevented the labor organization from using a dissenting employee's compelled fees for political and ideological purposes. *Id.* at 768-69.

The constitutional issues raised in *Hanson* and *Street* were addressed in the seminal case of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In that case, this Court considered a Michigan law providing for "agency shop" which permits private labor organizations representing governmental employees to negotiate for an agency shop clause in their contract with the employer. Agency shop requires employees who do not belong to the exclusive representative labor organization to pay that organization a service fee in an amount up to regular member dues as a condition of continued employment. *Id.* at 211. Although relying on *Hanson* to uphold the facial constitutionality of agency shop, this Court rejected the facile constitutional analysis of *Hanson* by noting:

> "To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests." *Abood*, 431 U.S. at 222.

Such an arrangement was constitutionally permissible only insofar as it was "used to finance expenditures by the Union for the purposes of *collective bargaining, contract*

administration, and *grievance adjustment*." 431 U.S. at 225-26 (emphasis added).

This Court in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 (1984), noted:

> "[B]y allowing the union shop at all, we have already countenanced *a significant impingement* on First Amendment rights." *Ellis*, 466 U.S. at 448 (emphasis added).

In spite of this "significant impingement of First Amendment rights," this Court stated that any interference with the employees' associational rights was constitutionally justified by the government's compelling state interest in industrial peace and stability fostered by the collective bargaining process. *Abood*, 431 U.S. at 222-23. *See Hanson*, 351 U.S. at 233; *Street*, 367 U.S. at 761; *Ellis*, 466 U.S. at 448; and *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 301 n.8 (1986). Any extraneous activity by the employee organization "not germane to its duties as collective-bargaining agent" could not be financed from fees paid by those who object to the organization's ideological viewpoint. *Ellis*, 466 U.S. at 447; *Abood*, 431 U.S. at 209; and *Communication Workers of America v. Beck*, 487 U.S. ___, 101 L. Ed. 2d 634, 646 (1988).

In *Hudson*, this Court again emphasized that only the government's compelling interest in industrial peace and stability justifies a limited intrusion upon nonmembers' First Amendment rights. *Hudson*, 475 U.S. at 301. This interest may be advanced by expenditures of compelled fees for activities that are "an integral part of the bargaining process." *Abood*, 431 U.S. at 236; *see Hudson*, 475 U.S. at 301. The nonmember employees "have a constitutional right to 'prevent the Union's spending a part of their

required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative.' " *Hudson*, 475 U.S. at 301-02.

In *Ellis*, this Court was primarily concerned with defining the lines between organizational expenditures that relate to collective bargaining that all employees in the bargaining unit are required to pay and those insufficiently related to justify their being imposed on nonmembers. To test these specific expenditures, this Court developed the following guidelines:

> "Hence, when employees such as petitioners object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are *necessarily or reasonably incurred* for the purpose of *performing the duties of an exclusive representative* of the employees in *dealing with the employer on labor-management issues*." 466 U.S. at 448 (emphasis added). *See Abood*, 431 U.S. at 222-23; *Beck*, 101 L. Ed. 2d at 657.

These principles were reaffirmed in *Hudson* when this Court stated:

> "[A]lthough the government interest in labor peace is strong enough to support an 'agency shop' notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the *procedure be carefully tailored* to minimize the infringement." 475 U.S. at 302-03 (emphasis added; footnote omitted).

The standard to determine chargeable costs certainly deserves the same careful tailoring required to determine

the propriety of collection procedures for the agency shop fee.

Recently, this Court in *Keller v. State Bar of California*, ___ U.S. ___, 58 U.S.L.W. 4661 (1990), held that the State Bar's use of mandatory dues to support political activities violated the First Amendment rights of lawyers who disagreed with the Bar's position. In analyzing the scope of permissible activities which may be financed with compelled fees, this Court applied the analysis used in agency shop fee decisions finding that there is "a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of the employee unions and their members, on the other." *Keller*, 58 U.S.L.W. at 4663.

Relying on the holding in *Abood*, this Court in *Keller* noted "that a union could not expend a dissenting individual's dues for ideological activities not 'germane' *to the purpose for which compelled association was justified: collective bargaining.*" *Id.* at 4664 (emphasis added). This Court found the political and ideological activities of the State Bar, including its lobbying activities, were not germane to the purpose of the State Bar.

Simply put, these cases make clear the point that requiring nonmember employees to pay any agency fees impact on employees' First Amendment rights of association and speech. Such an intrusion on constitutionally protected freedoms is only justified if a compelling or important governmental interest is actually advanced by the intrusion. In the case of agency shop, the compelling state interest is labor peace and stability which is advanced only to the extent that the compelled exactions

do not exceed the employees' pro rata share of the costs of collective bargaining, contract administration, and grievance adjustment. Although this type of analysis is mandated by the constitutional freedoms at stake, it was ignored by the Sixth Circuit in its decision of this case.

II

THE USE OF COMPELLED FEES FOR LOBBYING ACTIVITIES FAILS TO SURVIVE THE LEVEL OF SCRUTINY REQUIRED BY THE FIRST AMENDMENT

In the case at bar, there is no constitutional justification to compel objecting nonmember employees to underwrite the costs of a private labor organization's lobbying and other political activities which, at best, are only tangentially and insubstantially involved in the collective bargaining process.

The Sixth Circuit stated that "it is clear . . . that dissenting employees in the private sector may not be charged for political or ideological union activities." *Lehnert*, 881 F.2d at 1391. It nonetheless held that "union lobbying to obtain funds for public education generally . . . and other similar political activities," including millage and ballot campaigns are chargeable because there "are, as noted . . . in *Abood*, fundamental differences between collective bargaining in the public sector and in the private sector." *Lehnert*, 881 F.2d at 1391-93. The Sixth Circuit misreads *Abood*.

In *Abood*, this Court recognized that "[t]he process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining

table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process." *Abood* 431 U.S. at 236.

In this passage, this Court speculated that subsequent to face-to-face negotiations in the public sector the exclusive representative might have to convince an elected body to adopt the proposed agreement. This Court also seemed to recognize that budgetary decisions impacting on bargaining in the public sector are not always made at the same time as bargaining itself. This Court, does not, however, authorize use of compelled service fees for activities that are outside the scope of bargaining, contract administration, and grievance adjustment. Compelling an objecting nonmember employee to underwrite the costs of lobbying and policy related activities *not* related to collective bargaining is just too remote to justify infringing on individual First Amendment rights.

The closest analogy to lobbying is found in the *Ellis* opinion in its discussion regarding litigation expenses. There this Court determined that unless the expense of litigation directly concerns negotiating and administering the contract or settling grievance and disputes arising in the bargaining unit, objecting employees need not share the costs *because the litigation impacts the industry or protects the rights of employees generally. Ellis,* 466 U.S. at 453.

In the collective bargaining process, lobbying which is not limited to attempts to have the collective bargaining agreement funded is outside the scope of collective bargaining. It becomes substantive in nature and has

ideological overtones. Because that type of lobbying impacts employees in general, or even the public as a whole, objecting employees should not share in its costs. This Court has acknowledged Thomas Jefferson's view that " ' "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." ' " *Abood*, 431 U.S. at 234 n.31; *Keller*, 58 U.S.L.W. at 4663. While voluntary dues and fees collected from nonobjecting workers may be used to finance this political and ideological activity, it is an impermissible infringement on the constitutional rights of objecting nonmember employees to use their compelled fee for such purposes.

The bottom line of this analysis must rest on an identification of the state's interest in requiring agency shop. That interest cannot be merely to secure higher wages or better conditions for employees, for that type of interest can easily be advanced without infringing on nonmembers' First Amendment liberties—the Legislature could simply grant higher salaries. There would be no need or justification for compelled agency fees.

The state's interest must be something more. In *Hanson,* this Court recognized labor peace as one such interest. *Hanson,* 351 U.S. at 233. This interest was advanced through *a process* known as collective bargaining. *Id.* This Court accepted Congress' conclusion that "free riders" posed a danger to this process that could only be avoided by union shop agreement. *Id.* at 235. Yet this Court did not allow the use of compelled fees for just any purposes. Rather, compelled fees of objectors could only be used for purposes that advanced the government interest at stake—labor peace and stability.

That type of interest is not advanced in this case. This Court is not confronted with the dangers that free riders pose to the collective bargaining process. Instead, the issue is whether the union can compel nonmembers to pay for activities that the union has determined most effectively advance the goals of higher wages and better working conditions. Labor peace is not at issue here. The expenditures at issue have nothing to do with the collective bargaining process, and Michigan has identified no other state interest, important or otherwise, to justify the infringement on objectors' First Amendment rights.

III

COMPELLED FEES CANNOT BE USED TO SUPPORT ACTIVITIES UNRELATED TO THE SPECIFIC BARGAINING UNIT

By definition, an exclusive representative owes a statutory obligation to represent only those employees in a specific bargaining unit. Michigan Compiled Laws §§ 423.210 and 423.211 recognize that the exclusive representative of an appropriate unit is permitted to receive an agency shop fee from those employees who receive the benefits of this representation.

In the case at bar, the lower court decision allows activities not directly connected to the bargaining unit to be charged to dissenting employees. It allows the dissenting nonmember to be charged for lobbying and other politically related activities, activities of other bargaining units, conventions of MEA and NEA, public relations, and any other activity as long as the activity appears to advance some employment-related interest.

To allow these charges, the lower court ignored the protections of the First Amendment and the language in *Abood* requiring that there be a close relation of the activity to the bargaining unit. *Abood*, 431 U.S. at 236. This close relation was emphasized in *Ellis* in which this Court insisted that an expenditure must be for "activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the *bargaining unit*." *Ellis*, 466 U.S. at 447 (emphasis added). *See Keller*, 58 U.S.L.W. at 4664.

Yet the Sixth Circuit held that activities that advance employment related interests are constitutionally chargeable to objecting nonmembers "even if the chargeable activities . . . were unrelated to the specific bargaining unit of the dissenting employees." *Lehnert*, 881 F.2d at 1391-93. This is in stark contrast to the holding in *Ellis*.

The activities addressed by the Sixth Circuit are not germane to the purpose for which compelled association was justified. In *Abood* this Court recognized that the concept of agency shop implicates core free speech values, and is justified only to foster labor peace and stability through the collective bargaining process. Expenses must necessarily relate to the expenses of the bargaining unit itself to "defray the costs of collective bargaining, contract administration, and grievance adjustment." *Ellis*, 466 U.S. at 447. The employee organization cannot be allowed to charge objecting nonmembers with general lobbying and policy related expenses. To allow FFA to exact a compelled fee for lobbying, electoral campaigning, conventions, and public relations

unrelated to its bargaining unit forces the objecting nonmember to support ideological, nongermane positions with which he or she disagrees. This unjustifiably infringes on the First Amendment freedoms of speech and association of the dissenting employee.

IV

COMPELLED FEES CANNOT BE USED TO FINANCE ILLEGAL ACTIVITIES

Unlike the National Labor Relations Act, Michigan law bans public employee strikes. FFA has *no* right to strike under *any* circumstances, and *all* strikes by FFA are illegal. Section 423.202, Section 2, states that "[n]o person holding a position by appointment or employment in the government of the state of Michigan . . . or in the public school service . . . shall strike." Mich. Comp. Laws § 423.202, Section 2. Despite this law, FFA persisted in its preparation to use the strike weapon to achieve its goals. FFA financed its preparation with dissenting nonmembers' agency shop fees.

The Sixth Circuit ruled that objecting nonmembers can "be charged for union expenditures made in publicizing, preparing for and threatening a strike that would be illegal under Michigan law." *Lehnert*, 881 F.2d at 1393. The lower court reasoned that because FFA did not actually engage in an illegal strike, such negotiation tactics were within the range of reasonable bargaining tools. *Id.* at 1394. This is contrary to the holding in *Ellis* which states: "If the union cannot spend dissenters' funds for a particular activity, it has no justification for spending

their funds for writing about that activity." *Ellis*, 466 U.S. at 451.

Judge Merritt in his concurring and dissenting opinion, correctly points out that "[i]f the strike had gone forward and the house of the college president had been put to the torch, obviously the dissenters could not be charged with the gasoline for the fire. Likewise, dissenters should not be forced to pay the expenses for planning unlawful acts." *Lehnert*, 881 F.2d at 1396 (Merritt, J., concurring and dissenting).

Preparing for public employee strikes manifests nothing less than an intent on the part of FFA to prevent or obstruct the operations of government until their demands are satisfied. Rather than facilitate labor peace and stability, such actions often lead to violent and criminal acts. Requiring dissenting nonmember employees to finance these illegal activities violates their fundamental civil liberties.

CONCLUSION

The decisions of this Court establish that compelled service fees to a private labor organization constitute a significant infringement on objecting nonmembers' First Amendment rights of freedom of speech and association. Such an infringement on fundamental civil liberties can only be allowed if supported by compelling state interest. That state interest has been identified in the agency shop arena as the promotion of labor peace and stability through the collective bargaining process. FFA does not limit itself to such legitimate state interests. Instead, FFA

has used compelled service fees to pay for activities that it has determined most effectively advance the goals of higher wages and better working conditions including lobbying the Legislature and other policy related activities. These expenditures have nothing to do with the collective bargaining process and do not promote labor peace and stability. Such use of petitioners' compelled service fee constitutes a grievous injury to petitioners' fundamental civil liberties.

For the foregoing reasons, the judgment of the Sixth Circuit Court of Appeals should be reversed.

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Respectfully submitted,

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